ASSAULT ON THE PATENT SYSTEM

AND

HOW SECTION 4 OF THE CLAYTON ANTI-TRUST BILL HURTS MANUFACTURERS, DEALERS, AND PURCHASERS OF PATENTED ARTICLES

BY

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OF NEW YORK

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WASHINGTON
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ANSWER TO THE "ASSAULT ON THE PATENT SYSTEM."

The opponents of section 4 of the Clayton bill, as passed by the Senate, have just issued a small leaflet entitled an "Assault on the Patent System," copy of which is hereto attached.

This circular is made up of an article printed in the Washington Post for August 29 and a letter addressed by a New York lawyer, Mr. Gilbert H. Montague, to the New York Evening Post and printed in that paper for August 31.

A very casual comparison of these two articles shows that, if they were not written by the same person, at least the writers thereof had consulated together, and both articles are inspired by the same interests.

The leading feature in both articles is a protest in the name of the "small," or "independent" manufacturer. In both articles great stress is laid upon the necessity of allowing the manufacturer of a "delicate" patented mechanism to dictate the supplies to be used therewith, to "insure himself in seeing that it was properly used after it left his hand." Mr. Montague's letter sets forth this argument by a quotation from Mr. Leonard, an inventor (p. 8 of the circular). The article in the Washington Post contains the same argument expressed in exactly the same phraseology (see p. 4), although the quotation marks are omitted and Mr. Leonard's name is not mentioned.

Finally, Mr. Montague says in his letter that the Supreme Court of the United States in the so-called bathtub case—

> showed that the patent law affords no shelter to restraints of trade against the Sherman law. Every evil, therefore, which the Senate in adopting the provision above quoted sought to remove, has already been removed by the Sherman law.

This statement is echoed in the Washington Post article thus:

> Every possible abuse or unreasonable extension of this entirely legitimate right (viz: the right of the owner of a patented device to compel the purchaser to obtain unpatented supplies exclusively from him) is already prevented by the Sherman law, as has been shown in numerous decisions.

Thus the internal evidence is convincing that one and the same opposition is back of these two writings. Moreover, it is clear that Mr. Montague either actually wrote the Washington Post article or supplied all the material from which it was written. Therefore, it becomes important to attend closely upon Mr. Gilbert H. Montague and ascertain the strength, as well as the identity of the opposition voiced by him.

MR. MONTAGUE: THE PUBLICIST AND HIS CLIENTS.

Fortunately, Mr. Montague has been very industrious with respect to this subject matter, at least, since 1912. During the course of his activity he has fully made known his views, and his clients have indicated the identity of some of the interests he represents. Thus, Mr. William H. Ingersoll, of "dollar-watch" fame, while pleading before the House Committee on Patents June 10, 1914, for the enactment of a law that would enable the patent owners to dictate resale prices of patented articles throughout the United States, was asked whether or not Congress had power to pass such a law. He answered that his attorneys had so advised him. He was asked to name his attorneys, and he named two, one being Mr. Gilbert H. Montague. Mr. Ingersoll is at the head of the resale price pool. Therefore, it is clear that Mr. Montague represents, among other interests, the resale price fixers, who have been incessantly active against section 4.

In April and May, 1912, Mr. Montague contributed two articles to the Yale Law Journal. The first was headed "The Sherman Antitrust Act and the patent law" and the second "The Supreme Court on patents."

The second contribution is a glorification of the Supreme Court's decision in the celebrated mimeograph case (Henry *v.* A. B. Dick). When we compare that article with Mr. Montague's letter to the New York Evening Post, it is very clear that Mr. Montague has set about to save the "tying" clause restrictions in connection with patented articles, and to that end he has no regard for consistency or accuracy of statement.

HIS DEFENSE OF THE TYING RESTRICTIONS.

In the second article in the Yale Law Review he wrote of the mimeograph decision thus:

> Not since the creation of the patent system has the Supreme Court rendered a better considered decision affecting patent rights.

In 1914 he knows that the Members of Congress and the public generally are overwhelmingly of a contrary opinion. He knows that not a single man in the House or Senate undertook to defend that decision. Therefore, in his letter to the Post, he asserts merely that section 4 "reaches far beyond the facts presented in that case." But he makes no attempt to defend what he says is the best considered decision rendered in the history of the patent system.

Again, in the first of the law review articles above mentioned, he asserts that the bathtub decision in no way cuts down the rule of law announced in the mimeograph case. Of the bathtub case he says:

> The agreements related primarily to the manufacture and sale of articles which in no way were covered by the patent in question.

That is Mr. Montague's view in 1912 when glorifying the mimeograph decision and elaborating upon the unrestricted powers of patent owners. But in 1914 Mr. Montague is set upon saving the tying clauses upheld in the mimeograph case. He will now persuade us that they have been wiped out by the bathtub decision.

Of this decision he says in his letter to the Evening Post:

> The Supreme Court * * * showed that the patent law affords no shelter to restraints of trade against the Sherman law. Every evil, therefore, which the Senate, in adopting the provision above quoted, sought to remove has already been removed by the Sherman law.

In 1912 the bathtub decision has not touched the mimeograph case; in 1914 it has wiped out all the evils of that decision as viewed and anticipated by the Senate and House of Representatives. This is why we say Mr. Montague has no regard for consistency of statement.

MR. MONTAGUE V. CHIEF JUSTICE WHITE.

But his writings further show that he is either grossly ignorant of the attitude of Chief Justice White or that he has intentionally and deliberately attempted to mislead both lawyers and the public concerning the attitude of the Chief Justice.

In the second of the law review articles above referred to, Mr. Montague seeks to minimize and weaken the propositions set out in the dissenting opinion of the Chief Justice in the mimeograph case. No one would think of criticizing Mr. Montague merely because of his attempt to refute the reasoning of the Chief Justice. That is the prerogative of every lawyer, and, indeed, of every layman, and the strength of an argument never appears so clearly as in ineffectual attempts to destroy it. But Mr. Montague makes it appear that the Chief Justice is guilty of reversing himself. He quotes a glowing passage from the decision of the Supreme Court in the case of Bement *v.* National Harrow Co. (186 U. S., 70), decided in May, 1902. After quoting the paragraph, "this cogent reasoning—*with which the Chief Justice entirely agreed*—covers the whole ground" (viz, covered by the majority of the court in the mimeograph case; the italics are mine). Preliminary to quoting the paragraph and concerning it he says, "in which Chief Justice White, then an Associate Justice, participated and concurred." Just a sentence later he continues:

> The logic (of the Bement decision) which commanded the support of Associate Justice White completely exposes the fallacy into which the Chief Justice (White) has fallen in his dissenting opinion (i. e., in the mimeograph case) by departing from the principles to which he formerly gave his adherence.

Not content with asserting three times within the space of one page this alleged reversal of front by the Chief Justice, he returns to it a few pages later, and says:

> The passages above quoted from *Bement v. National Harrow Co., in which Chief Justice White, then Associate Justice, participated and concurred* show how long these principles have been fully recognized. (The italics are mine.)

Here, then, in four positive statements, it is asserted, the Chief Justice of the Nation has completely contradicted and reversed himself on a matter that vastly concerns the public. If he will do that on one occasion he will do it on another. The people despise an official who changes from day to day, and they would despise the utterances of a Chief Justice who in 1912 would take back and repudiate what he had said in 1902. But the Chief Justice has been guilty of no inconsistency or contradiction whatever. Mr. Montague's statements—all four of them—are absolutely false. The Chief

Justice had not a thing in the world to do with the decision of the case of Bement *v.* National Harrow Co. He did not "participate" or "concur" in anything said or done in that case. Mr. Montague knows this, or his ignorance of the fact renders his stupidity as dangerous as willful perversion in him would be. The very last lines of the opinion of the Supreme Court in this Bement case (186 U. S., 95) are as follows:

> Mr. Justice Harlan, Mr. Justice Gray, and Mr. Justice White did not hear the argument, and took no part in the decision of this case.

Those words comprise the conclusion of the court's opinion in every edition of the reports. They show that the Chief Justice had nothing whatever to do with the decision and that he is not responsible for one single proposition in the opinion.

It seems scarcely worth while to examine in detail what Mr. Montague has to say by way of objection to section 4.

He has shown that he can make contradictory uses of the bathtub decision, at one time declaring that it in no way qualified the mimeograph decision, which he regards as the best considered decision since the creation of the patent system; and at another time asserting that it wiped out all the evils sought to be eradicated by the Senate in attempting to change the law of the mimeograph case. He has attempted to discredit the views of the Chief Justice by falsely imputing to the Chief Justice an open-air flip-flop in argument which he himself glaringly exhibits.

MR. MONTAGUE'S ATTEMPT TO SAVE MONOPOLY.

Mr. Montague's letter to the New York Evening Post is worth just as much as his charges of inconsistency directed against the Chief Justice—and no more.

He starts out with a flourish that section 4 is "the hardest blow ever delivered to the patent system." Section 4 has nothing to do with patent rights, or the patent system. It has to do only with contracts involving patented articles and processes.

Next he says:

> Only patented articles and manufacturers of and dealers in patented articles would fall within this prohibition.

Reshaping the same thought later, he says the tying clauses have been and are now lawful, and then, to quote—

> under the provision adopted by the Senate, these agreements and arrangements still would be lawful, except when they happened to include any article covered by a patent.

Of course, the section applies only to patented articles for the reason that the tying clauses and conditions never have been and can not be imposed in connection with unpatented articles. Suppose the mimeograph had been unpatented, how could the manufacturer have sued the user for infringement of a patent? Mr. Montague knows that if a manufacturer of an office desk should offer to sell it only on condition that it be used with ink, paper, and pens obtained from the maker of the desk, that office furniture business would go to some one who sells desks without any "conditions." To

make section 4 apply to unpatented articles would be like prohibiting the killing of alligators in North Dakota.

Next, Mr. Montague laments the deplorable fate under section 4 of the "independent" manufacturer struggling against entrenched monopoly. He would have us believe that these "tying" contracts are the only resource of small manufacturers seeking to compete with monopoly. But this is the view of a man standing on his head; in it things literally are turned upside down. If a pigmy and a giant are in a struggle, and there is but one weapon of attack available, no one doubts which of the combatants will wield that weapon. The independent manufacturer of relatively small means can not impose conditions. Monopoly first gets control of the market and then forces the conditions or restrictions, and thereby perpetually keeps the independents out. Section 4 seeks to end this abuse and liberate the independents.

Then Mr. Montague commiserates the ignorant dealers who may sign the contracts without knowing that any of the articles described are patented, and thereby invite a prosecution and conviction of themselves for having committed a crime! This is extravagant. Waiving the question as to whether or not dealers or licensees could be guilty of violating the statute, it is absolutely certain they will not violate the law so long as their liberty of action and their profits are vastly enlarged by obeying it. Suppose the tariff on a given article is repealed, how many importers would remain ignorant of that fact, and continue to pay, or offer to pay, duty? When section 4 becomes a part of the law, purchasers and licensees who will violate it will be about as numerous as liberated convicts who attempt to break *into* jail.

Finally, Mr. Montague dwells on those instances of "complicated and delicate patented mechanisms," which, in order to work efficiently and maintain the reputation of the manufacturer, must be used only with accessories supplied by the owner of the patent. This is another argument based on the assumed ignorance of the purchaser or user. It amounts to this: A woman might buy a patented sewing machine. If left free to do so, she might use vinegar for lubricating oil, rotten thread, and attempt to sew through a piece of zinc, and the reputation of the sewing-machine manufacturer would be ruined. To prevent this the patent owner ought to be allowed to sell the machine on condition that it be used only with thread, oil, and cloth obtained from him. Of course this argument applies with equal force to unpatented articles. The packing houses sell fertilizer, and much of it is said to produce no results on the farmers' crops.

No doubt this is hard on the reputation of the sellers of fertilizer, and it may be due to the ignorance of the farmer in planting worthless seed. Why not let the manufacturers of fertilizer sell it "on condition" that it be used only with seed purchased from them. This would be paternalism in industry. After section 4 is a part of the law purchasers and licensees will still be free to get their unpatented supplies from the patent owners. Heretofore there has been no such freedom; the patent owners have shown their teeth, threatened suit for infringement, and forced the situation. They have sought to justify this lately, just as Mr. Montague does, by

pessimistic mutterings about the ignorant purchaser and user. Some one is going to be hit by section 4, but it will not be the dealers, licensees, or consumers, nor will it be the "small," "independent" manufacturers.

All persons have their choice between the views advanced by Mr. Gilbert H. Montague and by Chief Justice White. Mr. Montague regards the mimeograph case as the best-considered decision in the history of the patent system. The Chief Justice declared one of the reasons for his dissent was to make it clear that if the law remained as announced by the majority that would be owing to the inactivity of Congress after the evils had been pointed out. Mr. Montague says section 4 is a blow at the patent system. The Chief Justice asserted the mimeograph decision was a blow at the general welfare of the people, and he challenged Congress to wipe it out. Section 4 is the response of Congress to the warning of the Chief Justice. For whom has Mr. Montague sent up the cry of distress? Is he seeking merely to "promote the progress of science and the useful arts?"

FRANK Y. GLADNEY.

SEPTEMBER 9, 1914.

ASSAULT ON THE PATENT SYSTEM.

How Section 4 of Clayton Antitrust Bill Hurts Manufacturers, Dealers, and Purchasers of Patented Articles.

[Reprinted from Washington Post, Aug. 29, 1914, and the Evening Post (N. Y.) Aug. 31, 1914.]

INTRODUCTION.

Everything and everybody connected with the patent system is endangered by the provision adopted by the Senate on August 26, 1914, as an amendment to the Clayton antitrust bill (H. R. 15657), which makes criminal every contract relating to any patented article that contains any provisions "the effect of which" may be either to require the purchaser to acquire from the seller anything else not protected by the patent or in any way to restrict the purchaser "from using any article." Everybody who is party to any such contract is made liable to a fine of $5,000 or a year's imprisonment or both.

This provision subjects manufacturers, dealers, and purchasers of patented articles to fine and imprisonment for doing what manufacturers, dealers, and purchasers of unpatented articles always have done, and, under the terms of this provision, may still continue to do with absolute impunity.

[Reprinted from the Washington Post, Aug. 29, 1914.]

HITTING THE WRONG MARK.

Aiming at large corporations which, by the use of what are known as "tie-up contracts," prevent their customers from purchasing any machinery or wares from other sources of supply, the Senate, by the adoption of an amendment to the Clayton bill, has really restricted the competitive operations of smaller concerns fighting for their existence.

The purpose of the section which had been adopted is to make it unlawful for any person to insert a clause in a contract relating to the sale or lease of or license to use any article or process protected by a patent, the effect of which will be to restrict the purchaser or lessee from using any other article. While the object is to strike at large corporations which have strengthened themselves by such exclusive contracts, the burden will fall heaviest upon the concerns which are just establishing themselves and which have to make exclusive contracts in order that better known machines or patented articles, handled by the same agent, may not be given precedence.

Aside from the discrimination against the owners of patents, it should be clear that the smaller dealers in patented articles will now have no protection against the larger concerns. They will not be able to make terms for exclusive use of their machines or the exclusive sale of their products. The better known machines and products thus will have a distinct advantage over those which are just being introduced. Patents which were intended to encourage inventiveness will lose a large part of their value.

Moreover, it may be that the article is of such a nature that in order that it shall work properly it requires very great care in the conditions of use. In some instances a man's market for a good article would be completely destroyed if he could not insure himself in seeing that it was properly used after it left his hands. Under the section inserted in the Clayton law, an inventor's power over his own device, once it is leased, will be nil.

Agreements between customers, manufacturers, and dealers by which dealers furnish and customers obtain patented articles, on condition that they use them only with supplies specially prepared for them, are often absolutely necessary. Every possible abuse or unreasonable extension of this entirely legiti-

mate right is already prevented by the Sherman law, as has been shown in numerous decisions. The only result of additional legislation will be to confuse the Sherman law, which has been growing gradually clearer to lawyers and the business world.

[Reprinted from The New York Evening Post, Aug. 31, 1914.]

PERIL TO THE PATENT SYSTEM: GILBERT H. MONTAGUE POINTS OUT DESTRUCTIVE EFFECTS OF AMENDMENT TO PENDING ANTITRUST LAW PASSED BY SENATE—SHERMAN LAW ADEQUATE.

The Editor of The Evening Post:

Sir: The hardest blow ever delivered to the patent system of the United States fell on August 26, 1914, when the Senate, in Committee of the Whole, adopted as section 4 of the so-called Clayton antitrust bill (H. R. 15657) the following:

"That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents the effect of which will be to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees any article or class of articles not protected by the patent; and any such conditions shall be null and void as being in restraint of trade and contrary to public policy. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court."

Only patented articles and manufacturers of and dealers in patented articles would fall within this prohibition. The provision is, therefore, directed solely against patented articles and patent owners.

Adopted for the avowed purpose of repealing the rule of the Supreme Court of the United States in the Mimeograph case (*Henry* v. *A. B. Dick Co.*, 224 U. S., 1), this provision reaches far beyond the facts presented in that case, and would enmesh hundreds of manufacturers, dealers, and users of patented articles that never by any stretch of imagination can be claimed to be similarly situated to any of the parties in that case.

An independent manufacturer, seeking to establish himself in the face of competition from older concerns, often builds up a good will for his business by advertising and selling under the same brand all of his various products. He selects at local distributing points dealers who will undertake to push his entire "family of products," and to handle them exclusively, or at any rate to handle a specified variety and quantity of the various products of the "family" for a specified period in consideration of a special discount.

Under the provision above quoted this arrangement would still be permitted, so long as none of these products are patented.

If, however, any patented article happens to be included under such an arrangement, with the result that the agreement requires the dealer to buy both the patented article and also another article not covered by that patent, then the manufacturer and the dealer both would become liable to a fine of $5,000 and to a year's imprisonment.

MIGHT FALL ON INNOCENT PERSONS.

These penalties, under the express terms of this provision, might fall upon entirely innocent persons.

While the manufacturer generally knows whether any article or part of an article which he manufactures is "protected by a patent," the dealer generally does not know. Yet the penalties proposed would apply both to the manufacturer and to the dealer.

When the articles are marketed through the jobbing trade, both parties to the agreement might unwittingly be subjected to fine and imprisonment. For the provision reads simply "that it shall not be lawful to insert a condition in any contract relating to the sale * * * of * * * any article * * * protected by a patent or patents the effect of which will be to * * * restrict the purchaser * * * from using any article * * * supplied or owned

by any person other than the seller * * * or the effect of which will be to require the purchaser * * * to acquire from the seller * * * any article * * * not protected by the patent."

Ignorance by the parties to such a contract of the fact that an article covered by the agreement was "protected by a patent" would be no excuse. Absence of any intention to stretch the patent right beyond the article which it covers would be no defense. The crime would have been committed, and the penalties of fine and imprisonment would attach, regardless of the ignorance, or knowledge, or good intentions, or bad intentions of any of the parties. No matter who was responsible for inserting the forbidden condition in the contract, all the parties to the contract would be equally liable.

Still another class of agreements fall within the prohibition of this provision.

Agreements between customers, manufacturers, and dealers, by which manufacturers and dealers furnish, and customers obtain, complicated and delicate patented mechanisms, on condition that they use them only with supplies specially prepared for them, or in continuity with machines especially adapted to them, are often absolutely necessary.

H. Ward Leonard, one of the best-known independent inventors in the American field, and an officer of the Inventors' Guild that comprises the leading independent inventors of the country, defended just such agreements as these in his testimony before the Patent Committee of the House of Representatives.

"It may be," Mr. Leonard declared, "that the article is of such nature that in order that it shall work properly, it shall require very great care in selecting certain conditions of use, certain materials to be used in connection with it. It certainly is a fact that in some instances a man's market for a good article would be completely destroyed if he could not insure himself in seeing that it was properly used after it left his hands.

Under the provision adopted by the Senate, however, these reasonable and necessary agreements would be made criminal.

AGREEMENTS ALWAYS LAWFUL.

Let it be always remembered that, under the existing law, all the agreements and arrangements above described, which have been approved for generations by the highest standards of business practice and business morality, are entirely lawful; and that, under the provision adopted by the Senate, these agreements and arrangements still would be lawful, except when they happened to include any article covered by a patent.

The Supreme Court of the United States in the bath-tub case (*United States v. Standard Sanitary Manufacturing Co.*, 226 U. S., 20) showed that the patent law affords no shelter to restraints of trade against the Sherman law. Every evil, therefore, which the Senate, in adopting the provision above quoted, sought to remove has already been removed by the Sherman law.

The only effect, therefore, of this provision would be to make the mere possession of a patent an element of crime, and to forbid manufacturers, jobbers, dealers, and purchasers of patent articles to do things which the owners of every other form of property would be left absolutely free to do. Unlucky patent owners, caught in the far-reaching net of this provision, may reflect that, if they had only dealt in unpatented goods, instead of spending time and money developing new inventions which their patents published to the world to spend that in 17 years the world may use them without cost, they could have avoided all of their misfortunes.

Is this the way by which Congress seeks to "promote the progress of science and useful arts?"

GILBERT H. MONTAGUE.

NEW YORK, *August 21.*

Protests against section 4 of the Clayton Anti-trust bill (H. R. 15657) should be addressed to any Senator or Congressman, and especially to the chairmen of the following committees having charge of the bill:

Committee of the Senate on Judiciary: Charles A. Culberson, chairman, of Texas; Lee S. Overman, of North Carolina; William E. Chilton, of West Virginia; James A. O'Gorman, of New York; Duncan U. Fletcher, of Florida; James A. Reed, of Missouri; Henry F. Ashurst, of Arizona; John K. Shields, of Tennessee; Thomas J. Walsh, of Montana; Hoke Smith, of Georgia; Clarence D. Clark, of Wyoming; Knute Nelson, of Minnesota; William P. Dilling-

ham, of Vermont; George Sutherland, of Utah; Frank B. Brandegee, of Connecticut; William E. Borah, of Idaho; Albert B. Cummins, of Iowa; Elihu Root, of New York.

Committee on the House of Representatives on Judiciary: Edwin Y. Webb, chairman, of North Carolina; Charles C. Carlin, of Virginia; John C. Floyd, of Arkansas; Robert Y. Thomas, jr., of Kentucky; H. Garland Dupre, of Louisiana; Walter I. McCoy, of New Jersey; Daniel J. McGillicuddy, of Maine; Jack Beall, of Texas; Joseph Taggart, of Kansas; Louis FitzHenry, of Illinois; John F. Carew, of New York; John B. Peterson, of Indiana; John J. Mitchell, of Massachusetts; Andrew J. Volstead, of Minnesota; John M. Nelson, of Wisconsin; Dick T. Morgan, of Oklahoma; Henry G. Danforth, of New York; L. C. Dyer, of Missouri; George S. Graham, of Pennsylvania; Walter M. Chandler, of New York.